No. 89-257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RRI REALTY CORP.,

Petitioner,

– against –

THE INCORPORATED VILLAGE OF SOUTHAMPTON, ROY L. WINES, JR., Mayor, ORSON D. MUNN, JR., PAUL PARASH, CHARLES F. SCHREIER, JR., and RICHARD L. FOWLER, Constituting the Board of Trustees of the Village of Southampton, SHERBURNE BROWN, COURTLAND SMITH, VICTOR FINALBORGO, JOHN WINTERS and MORLEY A. QUATROCHE, Constituting the Board of Architectural Review of the Village of Southampton, and EUGENE R. ROMANO, the Building Inspector of the Village of Southampton,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a constitutionally protected interest in a partial building permit may be properly claimed not to exist where:

1) Local law provides that issuance of the permit may properly be withheld in the lawful discretion of a local architectural review board, and where;

2) The partial permit is not authorized under local law and was an integral part of an overall building plan held to be illegal under local law.

LIST OF ALL PARTIES

The caption of this case in this Court contains the names of all parties to the proceeding in the Court of Appeals for the Second Circuit.

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RRI REALTY CORP.,

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondents, Sherburne Brown, Courtland Smith, Victor Finalborgo, John Winters and Morley A. Quatroche, constituting the Board of Architectural Review of the Village of Southampton, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 870 F.2d 911 (2d Cir. 1989).

STATEMENT OF THE CASE

In 1979, the Plaintiff, RRI Realty Corp., purchased a 63 room mansion on the ocean front in the Village of Southampton, New York. RRI Realty Corp., v. The Incorporated Village of Southampton, et al., 870 F.2d 911,913 (2d Cir. 1989) (Pet.App. A-4). (References to "(Pet.App. A-__)" are to pages of the petitioner's appendix. References to "(T.__)" are to the trial transcript. "(E.__)" refers to the exhibit volume) The property, described by RRI's principal, Mr. Barry Trupin, as a personal residence (T.1628-1629), has been

known as the Dupont House and Dragon's Head.

RRI planed to expand and renovate the house extensively. 870 F.2d at 913 (Pet.App.A-4). In furtherance of this plan, RRI representatives met with Eugene Romano, the Southampton Village Building Inspector, to discuss procedures. id. at 913 (Pet.App.A-4). Initially, a building permit for kitchen renovations was issued. (E.48, E.49). This initial permit did not provide for any other work other than the kitchen renovations.

RRI's architect and engineer knew that the Southampton Village Code required a building permit for any type of renovation and that such permits had to be obtained

prior to commencing construction (T.925-26, 944, 966, 1395-96, 1426). They also knew that construction commenced without a permit could be shut down immediately (T.944). Despite this, RRI proceeded -- without the required permit -- to rebuild and expand the house to almost double it's original size. (T.944-45).

RRI's original plans called for a structure -- characterized by numerous Camelot-style towers -- that exceeded the legal height restrictions in the village. As such, RRI applied for and obtained an initial height variance from the Village's Zoning Board of Appeals (ZBA) in anticipation of future construction. 870 F.2d at 913

(Pet.App. A-5).

Construction thereafter proceeded, from 1981 through 1983, without a building permit other than the initial kitchen permit. In the spring of 1983, however, RRI was ready to submit its overall plan for approval. 870 F.2d at 913 (Pet.App. A-5). Under the Village Code, RRI was required first to submit plans to the Village's Architectural Review Board (ARB) for approval before the building inspector could issue a permit. Southampton, New York, Code §116-32(1984). RRI thus submitted the design plans and other partial plans to the ARB and these plans were approved, by the ARB, in May of 1983. (E.13). The ARB

decision, which considered proposals for the overall construction of the house, noted that an additional height variance would be required for the structure and that an application for a building permit had yet to be filed. (T.170, 479). RRI was aware that no building permit could be issued unless the ZBA granted the additional height variance. (T.459, 1432).

After repeated requests, RRI applied for the height variance (the second variance application), concerning the portion of the proposed structure that would exceed the previous height variance. 870 F2d. at 913 (Pet.App. A-5). RRI continued to

build, however, without a permit while the variance application was pending. In February of 1984, the building inspector again insisted that RRI file a building permit application. (T.428; E.35). RRI then, finally, filed an application.

The plans submitted were not in compliance with the Zoning Code and would require the second height variance before the permit could be issued. (T.420, 423-424). The variance application had not been decided, however, and would not be until May 1984. At that time, the height variance was denied. This denial was unsuccessful and challenged by RRI in the New York State Supreme Court. See RRI

Realty Corp., v. Hattrick, 132 (A.D.2d 558, 517 N.Y.S.2d) 284 (2d Dep't 1987).

Prior to the denial of the variance application, and in an effort to assist RRI in continuing the project, the building inspector proposed a novel plan of dividing the application plans into three stages. (T.337) Stage one covered the area of the house covered by the kitchen permit. (T.1336) Stage two covered that portion of the existing house which complied with the Code. (T.335, 336, 1336). Stage three covered the portions of the construction which were known to violate the Code. (T.429). RRI agreed to try the procedure and produced, for review by the ARB, a

set of bizarre plans. The stage two plans produced for the ARB 's review consisted of a house with the roof (including the already constructed towers), parts of one existing side, and an entire existing wing missing. 870.F.2d at 913 (Pet.App. A-6).

The building inspector referred the stage two plans to the ARB in April of 1984. (T.157). The plan submitted, unlike the less detailed overall plan submitted in May of 1983, had portions of the stage three area whited out and a portion of the roof marked in red. (T.1958,431). They were not plans for a entire house.

No architectural review had ever been approved by the ARB for a

partial house plan. (T.1968 460-61). Moreover, the ARB felt that it could not evaluate the proposed house "or any other house on its aesthetic value from a set of plans that has no roof or whose roof is incomplete from here up". (T.1958). Because the ARB could not evaluate RRI's design, it could not sign a building permit. (T.431). As RRI had no building permit for all of the post-stage-one construction, and pursuant to a directive from the acting mayor, the building inspector issued a stop-work order on May 17, 1984. 870 F.2d. at 913 (Pet.App. A-6).

On June 1, 1984, RRI commenced a mandamus proceeding in New York State Supreme Court,

pursuant to Article 78 of New York's Civil Practice Law and Rules, seeking to compel the building inspector to issue the stage two building permit and to cancel the stop work order. 870 F.2d at 913. (Pet.App. A-6). In April of 1986, the State Court granted summary judgment to RRI,

> ...finding that the ARB had refused to approve the stage-two permit because of its awareness that the stage-three would violate the existing zoning regulations, and that this was an impermissible consideration for the ARB, whose role is limited by Section 116-33 of the Village Code to matters of aesthetic judgment...the State Court then found that by the time RRI had commenced the Article 78 proceeding, the ARB was in violation of the code provision

> requiring the ARB, if it does not approve a permit application, to hold a public hearing within 30 days of its receipt of the application... since the 30-day period had expired, RRI was deemed entitled to the stage-two permit as a matter of law.

870 F.2d at 914 (Pet.App. A-6, A-7).

Pursuant to the State Court's order, the building inspector issued the stage-two building permit in August, 1986. 870 F.2d at 914 (Pet.App. A-7). Shortly thereafter, RRI commenced this suit pursuant to 42 U.S.C §1983, claiming that the Village's delay in issuing the stage-two building permit deprived it of property without due process of law. The

matter was tried to a jury, who found for the plaintiff and awarded 1.9 million in damages. The judgment also included $762,970.36 in attorneys' fees, and costs.

On appeal, the Second Circuit reversed the District Court Judgment holding that RRI had established no federally-protected property interest in the issuance of the stage-two permit. 870 F.2d at 918-20 (Pet.App. A-4, A-17, A-19).

RRI petitioned for rehearing in banc, and this petition was denied. (Pet.App. A-35) Subsequently, RRI petitioned this Court for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I

The Second Circuit's Decision Is Consistent With Prior Decisions Of This Court.

The Second Circuit held that the District Court did not properly address the threshold issue of whether RRI Realty Corp., had a constitutionally protected property right to the issuance, by government officials of the Village of Southampton, of the exotic "stage-two" building permit. In so doing, the Second Circuit correctly applied the "entitlement to benefit" analysis adopted by this Court in Board of Regents v. Roth, 408 U.S.564 (1972). The Second Circuit's application of Board of Regents is consistent with this

Court's holding in Roth and promotes the policy of that decision.

In Board of Regents v. Roth, this Court held that "[t]o have a property interest in a benefit a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. Roth further requires that the "property interest" issue be determined with reference to State Law:

> Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that

> secure certain benefits and that support claims of entitlement to those benefits.

Id.

In cases involving claimed due process violations in the issuance of land use permits, the Second Circuit has uniformly applied the "entitlement" analysis of Board of Regents v. Roth. See, e.g. RRI Realty Corp., v. The Incorporated Village of Southampton, 870 F.2d 911, 914-20 (2d Cir. 1989) (Pet.App. A-10 - A-19); Dean Tarry v. Friedlander, 826 F.2d 210, 212, (2d Cir. 1987); Sullivan v. Town of Salem, 805 F.2d 81,84 (2d Cir. 1986); Yale Auto Parts, Inc. v. Johnson 785 F.2d 54,59 (2d Cir. 1985). In applying

the standard, moreover, the Second Circuit has evolved a test, consistent with this Court's ruling in Roth for analysis of the property right interest. That test is clearly exposed in the RRI Realty Corp., decision

> In this Circuit, our post-Roth cases considering a landowner's claim of a due process violation in the denial of an application for regulated use of his land have been significantly influenced by the Roth "entitlement" analysis. In Yale Auto Parts, Inc., v. Johnson 758, F.2d 54 (2d Cir. 1985), the landowner had been denied a permit to use his property for an automobile junk-yard business. Expressly invoking Roth, Judge Mansfield focused initially on whether the landowner had "a legitimate claim of entitlement" to the

> license he saw and formulated the test for this inquiry to be that "absence the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted."

RRI Realty Corp. v. The Incorporated Village of Southampton, 870 F.2d at 917 (quoting Yale Auto Parts Inc., v. Johnson, 758 F.2d at 59). Since its decision in Yale Auto Parts the Second Circuit has refined the test to consider the impact of the regulator's discretion on the "certainty or likelihood" of issuance of a permit:

> The fact that [a] permit could have been denied on non-arbitrary grounds defeats the federal due process claim. Focusing on the authority of the local

regulator thereby permits the threshold rejection of some federal due process claims, without awaiting exploration of whether the regulator acted so arbitrarily as to offend substantive due process in a given case.

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If Federal Courts are not to become zoning boards of appeals... the entitlement test of Yale Auto Parts -- "certainty or a very strong likelihood" of issuance -- must be applied with considerable rigor. Application of the test must focus primarily on the degree of discretion enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case. See Walentas v. Lipper, 862 F.2d. 414, 419 (2d Cir. 1988); RR Village Ass'n, Inc. v. Denver Sewer Corp., 826 F.2d 1197, 1201-02 (2d Cir. 1987); Sullivan v. Town of Salem, Supra 805

__F.2d at 85.

Id. at 918 (Pet.App. A-16).

This threshold analysis -- focusing on the degree of discretion enjoyed by the local regulator, is consistent with the policy announced in Board of Regents v. Roth. Application of the test permits the Court at the outset, to determine whether a legitimate claim of entitlement exists by reference to the local regulator's powers. The test eliminates suits not based on legitimate claims of entitlement: "Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny

issuance suffices to defeat the existence of a federally protected property interest." Id. at 918 (Pet.App. A-16).

In applying the test to this case, the Second Circuit considered the broad discretion granted to the ARB to reject plans based on its aesthetic judgment. Id. At 919, (Pet.App. A-17). The court further noted that the plaintiff could have had no legitimate expectation of the issuance of the permit (much less an entitlement to it) prior to the State Court's surprising decision directing the issuance of the stage-two building permit. The Court noted that the Village had never before approved a partial building permit, that the structure

violated zoning regulations and that, in fact, the plaintiff was never able to obtain zoning approval for the overall plan. Id. at 919 (Pet.App. A-18). Moreover, and despite the State Court's ruling directing the issuance of the stage-two permit, the Village code prohibited the issuance of such a permit. Southampton, New York, Code §116-37A(2)(a) and (2)(b)(Respondent's App A-1).

The petitioner states that the Second Circuit's decision undermines this Court's holding in Roth. This is not so. The Second Circuit has adapted a workable test which is consistent with the screening policy espoused in Roth. The petitioner also claims that

there is "confusion among the Circuits" as to the meaning of the Roth decision, and that the Second Circuit's holding in RRI Realty adds to that "confusion". Whatever is meant by "confusion", it is clear that the petitioner has demonstrated no such confusion in its petition. Certainly, no case law was cited to demonstrate this supposed "confusion". Hence, the writ should not be granted.

II

The Petitioner Demonstrates No Need For Clarification Of The Effect Of Official Discretion On The Availability Of Due Process

The petitioner claims that this Court should grant the writ because of an alleged need for clarification of the effect of

official discretion on the availability of due process protections. Pet.Cert. 12-15. This question, as framed and explicated in the petition, is beyond the scope of the petitioner's own question presented. Moreover, with respect to the "property interests" question before this Court, no such need for clarification has been shown.

The petitioner's citation of Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) does not establish such a need. The Sullivan court dealt with the denial of a certificate of occupancy on concededly unlawful grounds by a local regulator who

had no statutory discretion to do so. Id. at 85. There was, moreover, no other lawful ground within the building department's discretion on which to base such a denial. Id. at 85. The RRI Court cited Sullivan approvingly. See 807 F.2d at 918 (Pet.App. A-14). Applying the standards found in Sullivan and in other cases applying Roth, the Second Circuit correctly found that the ARB had a reservoir of lawful discretion under which the permit could be denied. See 807 F.2d at 919 (Pet.App. A-17 - 19). Thus, the misfounded reference to Sullivan does not establish a need for this Court to intervene to "clarify" any issue.

The citation to Webster v. Doe, ___U.S.___, 108 S.Ct. 2047, 2053-54 (1988) is equally unavailing. In Webster, this Court reviewed the issue of whether a decision of the director of the Central Intelligence Agency to discharge an employee under Section 102(c) of the National Security Act, may be reviewed under the Administrative Procedure Act. Id. at ___, 108 S.Ct. at 2051. No constitutional property interest questions were presented in Webster and in fact, those issues were not even addressed by the District Court. Id. at ___, 108 S.Ct. at 2051. The invocation of Webster, therefore, does nothing to advance the petitioner's meager argument.

Finally, the petitioner's suggestion that there is some variance in "the criteria developed by the Courts of Appeals in determining the extent to which due process protection applies to applicants for land use permits" is disingenuous. Pet.Cert. at 14. The issue here is whether RRI Realty had any constitutionally protected property interest in the stage-two building permit at all, not what constitutional criteria might be applied in determining the extent of those rights. Hence, the argument lacks substance.

In sum, the petitioner has demonstrated no bona fide need for clarification with respect to the question presented.

III

This Case Is An Inappropriate Vehicle For Review Of The Question Presented.

The evidence showed that the ARB believed it was without power to consider the stage-two application because (1) there was no provision for issuance of a stage-two or partial building permit in the Village Code; (2) the ARB knew that the overall plan was illegal and violated the Village Code; and (3) the ARB could not pass aesthetic judgment on a partial plan, which, inter alia, lacked a roof. See 870 F.2d at 913, 919 (Pet.App. A-6, A-18). In fact, the overall design was ultimately declared to be illegal as violating the Village Zoning

Code, thus insuring that RRI could never legally build the structure. See RRI Realty v. Hattrick, 132, A.D.2d 558, 517 N.Y.S.2d 284, 285, (2d Dep't 1987).

The facts of this case present a poor record for review of such a potentially serious issue. In essence, RRI Realty had exploited the unappealed and obviously wrong decision of the State Court in RRI Realty v. Romano, Index No. 84-10639 (Sup.Ct. Suffolk Co., April 3, 1986) (unreported) (Pet.App. A-39 - A-49). The Second Circuit addressed the issue -- correctly -- as a purely legal one, and held that as the Village Code gave broad discretion to approve or disapprove

building permit applications to the ARB, no litigant could have a legitimate and constitutionally protected entitlement to that permit. 870 F.2d. at 918-920 (Pet.App. A-17 - A-19).

Despite assertions to the contrary, the petitioner actually seeks a review of the facts by this court. The petitioner wants this Court to decide, as a matter of fact, that although the ARB had absolute and lawful discretion under the applicable code provisions, the board nevertheless had no such discretion. This is an improvident basis upon which to grant certiorari and should not be countenanced. This Court should not trouble itself with intensive

fact reviews of cases without significant precedential value or general application.

Finally, this case, in its most simple terms, involves a claim by a disgruntled, wealthy, land owner against a local government concerning the concedely illegal construction and renovation of his mansion on the Atlantic Ocean in a resort community. A less deserving beneficiary of the expansion of Section 1983 protections can hardly be imagined.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: September 6, 1989

Respectfully submitted,

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APPENDIX

A-1

Village of Southampton, New York, Code Ch. 116, §116-37 (2)(a) (Gen.Code Pub.Corp. 1984)

No building or structure shall be erected, constructed, reconstructed, structurally altered or moved unless a building permit authorizing same shall have been issued.

Village of Southampton, New York, Code Ch. 116, §116-37 (2)(b) (Gen.Code Pub.Corp. 1984)

No building permit shall be issued for the erection, construction, reconstruction, structural alteration, restoration, repair or moving of any other building or structure or part thereof unless the plans and intended use indicate that such building or structure is designed and intended to conform in all respects to the provisions of this chapter and the Board of Architectural Review has approved the design.